

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA :
: 16 Cr. 763-09 (LGS)
-against- :
: ORDER
EDUARD MISELEVICH, :
Defendant. :
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LORNA G. SCHOFIELD, District Judge:

Background

WHEREAS, on April 6, 2020, Defendant filed a letter that this Court construes as a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A);

WHEREAS, on December 21, 2017, Defendant pleaded guilty to (i) one count of Conspiracy to Commit Health Care Fraud, Mail Fraud, and Wire Fraud in violation of 18 U.S.C. § 1349; and (ii) one count of Health Care Fraud in violation of 18 U.S.C. § 1347. On June 12, 2018, Defendant was sentenced to 36 months' incarceration, to run concurrently on both counts, followed by three years of supervised release, also to run concurrently on both counts;

WHEREAS, Defendant represents in his motion that he was released from custody to a halfway house and is expected to remain there until he begins his term of supervised release on May 6, 2020;

WHEREAS, the President of the United States has declared a national emergency due to the spread of the COVID-19 virus. The first COVID-19 case in the State of New York was confirmed on February 29, 2020. *See Coronavirus in N.Y.: Manhattan Woman is First Confirmed Case in State*, at <https://www.nytimes.com/2020/03/01/nyregion/new-york-coronavirus-confirmed.html>. As of April 7, 2020, there were 138,836 confirmed cases in New

York. *See Coronavirus in the U.S.: Latest Map and Case Count*, at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last viewed April 7, 2020). Over 5,000 persons have died in New York of the virus and nearly 12,000 have died nationwide. *Id.*;

Exhaustion of Administrative Remedies

WHEREAS, 18 U.S.C. § 3582(c)(1)(A) states,

The court may not modify a term of imprisonment once it has been imposed, except . . . upon motion of the Director of the Bureau of Prison, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf, or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier

WHEREAS, Defendant's motion states that he has not exhausted his administrative remedies or otherwise satisfied this provision;

WHEREAS, the Court does not have the authority to waive the administrative exhaustion requirements stated in § 3582. *See e.g., Theodoropoulos v. I.N.S.*, 358 F.3d 162, 172 (2d Cir. 2004) (“[A]s a general rule, courts are required to strictly enforce statutory exhaustion requirements.”); *United States v. Hernandez*, 2020 WL 1445851, at *1 (S.D.N.Y. Mar. 25, 2020);

“Extraordinary and Compelling Reasons”

WHEREAS, 18 U.S.C. § 3582(c)(1)(A)(i) further provides that the court “may reduce the term of imprisonment” only if it finds that “extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission”;

WHEREAS, the relevant Sentencing Commission Policy Statement, U.S.S.G. § 1B1.13, provides that the Court may reduce a term of imprisonment if three conditions are met: (i)

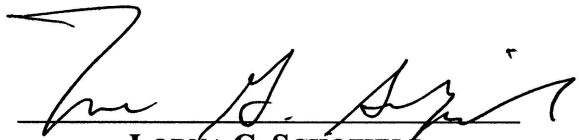
extraordinary and compelling reasons warrant the reduction, *id.* § 1B1.13(1)(A); (ii) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g), *id.* § 1B1.13(2); and (iii) the reduction is consistent with this policy statement, *id.* § 1B1.13(3); *accord United States v. Gotti*, No. 02 Cr. 743-07, 2020 WL 497987, at *1–2 (S.D.N.Y. Jan. 15, 2020);

WHEREAS, the Application Notes to the Policy Statement provide in relevant part that “extraordinary and compelling reasons” exist where the defendant “is suffering from a serious physical or medical condition,” “that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.” U.S.S.G. § 1B1.13, Application Note 1(A);

WHEREAS, Defendant has not demonstrated the requisite extraordinary or compelling circumstances. Defendant is forty-seven years old and has not represented that he has been diagnosed with significant health issues. It is hereby

ORDERED that for the reasons stated above, Defendant’s motion for compassionate release is DENIED.

Dated: April 7, 2020
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE